INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
30th session
Agenda item 6

92FUND/EXC.30/10
21 October 2005
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RECORD OF DECISIONS OF THE THIRTIETH SESSION OF THE EXECUTIVE COMMITTEE

(held on 17 and 21 October 2005)

Chairman:	Mrs L Eriksson (Finland)
Vice-Chairman:	Mr V Schöfisch (Germany)

Opening of the session

In the absence of the Chairman, Mrs Lolan Margaretha Eriksson (Finland), the 30th session of the Executive Committee was opened by the Vice-Chairman, Mr Volker Schöfisch (Germany), who chaired the session.

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.30/1.

2 Examination of credentials

2.1 The Executive Committee recalled that the 1992 Fund Assembly had, at its March 2005 session, decided to establish, at each session, a Credentials Committee composed of five members elected by the Assembly on the proposal of the Chairman to examine the credentials of delegations of Member States and that, when the Executive Committee held sessions in conjunction with sessions of the Assembly, the Credentials Committee established by the Assembly should also examine the credentials of the Executive Committee (Executive Committee's Rules of Procedure, Rule (iv)).

2.2 The Executive Committee noted that, in accordance with Rule 10 of the Assembly's Rules of Procedure, at its 10th session the 1992 Fund Assembly had appointed the delegations of Algeria, Australia, Republic of Korea, Sweden and Uruguay to the Credentials Committee.

2.3 The following members of the Executive Committee were present:

Algeria
Australia
China (Hong Kong Special Administrative Region)
Finland
Germany
India
Italy
Japan
Netherlands
Portugal
Republic of Korea
Russian Federation
United Arab Emirates
United Kingdom
Uruguay

2.4 After having examined the credentials of the delegations of the members of the Executive Committee, the Credentials Committee reported in document 92FUND/EXC.30/2/3 that all the above-mentioned members of the Executive Committee had submitted credentials which were in order.

2.5 The following Member States were represented as observers:

Angola	Ireland	Papua New Guinea
Antigua and Barbuda	Israel [<1>]	Philippines
Argentina	Jamaica	Poland
Bahamas	Kenya	Qatar
Belgium	Latvia	Saint Lucia
Cameroon	Liberia	Saint Vincent and the Grenadines
Canada	Malaysia	Singapore
Colombia	Malta	Spain
Croatia	Marshall Islands	South Africa
Cyprus	Mauritius	Sri Lanka
Denmark	Mexico	Sweden
Dominica	Monaco	Trinidad and Tobago
Estonia	Morocco	Turkey
France	New Zealand	Tuvalu
Georgia	Nigeria	Vanuatu
Ghana	Norway	Venezuela
Greece	Panama	

2.6 The following non-Member States were represented as observers:

Brazil	Iran (Islamic Republic of)	Saudi Arabia
Côte d'Ivoire	Kuwait	
Egypt	Peru	

2.7 The following intergovernmental organisations and international non-governmental organisations were represented as observers:

Intergovernmental organisations:

European Commission
International Maritime Organization (IMO)
International Oil Pollution Compensation Fund 1971
International Oil Pollution Compensation Supplementary Fund 2003

International non-governmental organisations:

Comité Maritime International (CMI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
International Union of Marine Insurance (IUMI)
Oil Companies International Marine Forum (OCIMF)

[<1>] Israel became a Member of the 1992 Fund on 21 October 2005.

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of document 92FUND/EXC.30/3, which contained summaries of the situation in respect of all seven incidents dealt with by the 1992 Fund since the Committee's 26th session, held in October 2004.

3.2 Incident in Germany

3.2.1 The Executive Committee took note of the developments in respect of the incident in Germany as set out in document 92FUND/EXC.30/4.

3.2.2 The Committee recalled that from 20 June to 10 July 1996 crude oil had polluted the German coastline and a number of German islands close to the border with Denmark in the North Sea. It was recalled that following their investigations the German authorities had approached the owner of the Russian tanker *Kuzbass* (88 692 GT) and requested that he should accept responsibility for the oil pollution, stating that failing this the authorities would take legal action against him. It was also recalled that the shipowner and his P&I insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), had denied any responsibility for the spill.

3.2.3 The Committee also recalled that the German authorities had informed the 1992 Fund that, if their attempts to recover the cost of the clean-up operations from the owner of the *Kuzbass* and his insurer were to be unsuccessful, they would claim against the 1992 Fund.

3.2.4 It was recalled that the limitation amount applicable to the *Kuzbass* under the 1992 Civil Liability Convention was estimated at approximately 38 million Special Drawing Rights (SDR) (£30.7 million).

Legal actions

3.2.5 It was recalled that in July 1998 the Federal Republic of Germany had brought legal actions in the Court of first instance in Flensburg against the owner of the *Kuzbass* and the West of England Club, claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£890 000), subsequently increased to €1.4 million (£980 000).

3.2.6 The Committee recalled that the 1992 Fund had been notified in November 1998 of the legal actions and that in August 1999 it had intervened in the proceedings in order to protect its interests.

3.2.7 The Committee also recalled that, in order to prevent their claims against the Fund becoming time-barred at the expiry of the six-year period from the date of the incident, the German authorities had taken legal action against the 1992 Fund in June 2002. It was recalled that the 1992 Fund had applied successfully to the Court to stay the proceedings in respect of this action, pending the outcome of the action by the German authorities against the shipowner and the West of England Club.

3.2.8 It was recalled that in December 2002 the Court of first instance had rendered a part-judgement in which it had held that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage. It was also recalled that the Court had acknowledged that the German authorities had failed to provide conclusive evidence that the *Kuzbass* was the vessel responsible, but had held that the circumstantial evidence pointed overwhelmingly to that conclusion.

3.2.9 The Committee recalled that the shipowner and the West of England Club had appealed against the judgement. It was recalled that the main grounds for the appeal as regards substantive

issues were that the *Kuzbass* could not have reached the alleged dumping area in the time available, that the chemical analyses of the pollution samples did not provide conclusive proof that the oil originated from the *Kuzbass* and that there were three other vessels in the southern North Sea at the relevant time that had previously carried cargoes of Libyan crude oil and which could therefore have caused the pollution.

3.2.10 The Committee recalled that the German authorities had submitted a statement of response to the appellants' grounds for appeal, reiterating the circumstantial evidence that had led the Court of first instance to conclude that the *Kuzbass* was the source of the pollution and also addressing the points raised by the appellants in their appeal.

3.2.11 It was recalled that in January 2004 the 1992 Fund had also submitted a statement of response, which was largely along the same lines as that of the German authorities.

3.2.12 The Committee recalled that at a hearing in December 2004, the Schleswig-Holstein Appeal Court had indicated that on the basis of the evidence submitted to date, it was far from convinced that the *Kuzbass* had been the source of the pollution, drawing attention in particular to other potential ship sources that the German authorities had failed to investigate. It was recalled that the Court had also raised doubts regarding the correctness of the circumstantial evidence and the Court of first instance's interpretation of that evidence. It was further recalled that the Court of Appeal had stated that on the basis of the documentation submitted to date, the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government. It was also recalled that the Court had strongly recommended that the parties reach an out-of-court settlement to the effect that the shipowner and the West of England Club would pay the German Government €120 000 (£85 000) and that the recoverable costs would be shared between the German Government and the shipowner/West of England Club on a 92%-8% basis, which would imply that the 1992 Fund should pay the balance of the admissible amount of the German Government's claim.

3.2.13 The Committee recalled that after the Court hearing in December 2004 the Director, in consultation with representatives of the German Government, had held without prejudice discussions with the West of England Club with a view to reaching an out-of-court settlement. It also recalled that the shipowner and the West of England Club had made a proposal for an out-of-court settlement involving all parties whereby the shipowner and the West of England Club would pay 18% and the 1992 Fund 82% of any proven losses suffered by the Federal Republic of Germany as a result of the incident.

3.2.14 It was recalled that, at its March 2005 session, the Executive Committee had authorised the Director to seek an out-of-court settlement with all other parties involved (ie the Federal Republic of Germany, the shipowner and the West of England Club) and to conclude such a settlement on behalf of the 1992 Fund, provided the amount to be paid by the shipowner and the West of England Club was increased above 18% (document 92FUND/EXC.28/8, paragraph 3.1.30).

3.2.15 The Committee noted that, following the March 2005 session, the shipowner and the West of England Club had increased their offer from 18% to 20%. It was also noted that, considering that under the circumstances there was no possibility to persuade them to increase the offer beyond 20%, and in the light of the decision by the Executive Committee, the Director had decided to accept the proposed settlement offer.

3.2.16 It was noted that in July 2005 the 1992 Fund and the West of England Club, with the assistance of ITOPF, had provisionally assessed the claim submitted by the German authorities at some DM1.8 million or €932 000 (£637 000) pending receipt of further information in respect of some claim items. The Committee noted that it was expected that the assessed amount would increase considerably once further details were provided.

3.2.17 The German delegation expressed its appreciation of the 1992 Fund's efforts to resolve the outstanding issues relating to the incident.

3.3 *Dolly*

3.3.1 The Executive Committee took note of the developments regarding the *Dolly* incident as set out in document 92FUND/EXC.30/5.

3.3.2 The Committee recalled that the *Dolly* had sunk in 20 metres depth in Robert Bay (Martinique), while carrying some 200 tonnes of bitumen and that no cargo had escaped. It was also recalled that there was a national park, a coral reef and mariculture near the grounding site, that artisanal fishing was carried out in the area and that there had been fears that the fisheries and mariculture would be affected if the bitumen were to escape.

3.3.3 It was recalled that the shipowner had been ordered by the authorities to remove the wreck but that he had not complied with the order, probably due to lack of financial resources. It was also recalled that the ship did not have any liability insurance.

3.3.4 The Committee recalled that, since the shipowner had not taken any measures to prevent pollution, the French authorities had arranged for the removal of 3.5 tonnes of bunker oil. It was recalled that in August 2004 the French authorities had informed the 1992 Fund that a contract had been awarded to a consortium comprising a French diving company and the managers of a yacht marina in Martinique. It was also recalled that the original intention had been to right the vessel on the seabed before removing the three cargo tanks containing the bitumen from the ship's hold, following which the tanks were to be towed to a dry dock in Fort de France for the bitumen to be removed. The Committee recalled that the total cost of the operation had been estimated at around €1 million (£678 000).

3.3.5 The Committee recalled that operations had commenced in October 2004. It was recalled that attempts to right the vessel on the seabed had been unsuccessful, and that the contractor had therefore decided to cut through the side and deck plating of the wreck in order to gain access to the three tanks containing the bitumen. It was also recalled that, as a result of heavy sea conditions and a number of unforeseen practical problems, removal of the tanks had taken longer than planned and had proved more difficult than anticipated. It was further recalled that by mid-December 2004 the contractors had removed the tanks from the hold with the aid of floatation bags and had laid them on the seabed near to the wreck, deciding to leave the tanks on the seabed until March 2005 when the weather would be more conducive to towing the tanks to the dry dock.

3.3.6 It was noted that the operations had been resumed in March 2005 as planned. The Committee noted however that, as a result of further technical problems, the towing of the tanks to shore and the removal of the bitumen had not been completed until July 2005.

3.3.7 The Committee noted that it was expected that the French Government would present its claim for the costs of the operations to remove the bunker fuel and bitumen cargo to the 1992 Fund in the near future and that the claim was expected to be in excess of €2.2 million (£1.5 million).

3.4 *Erika*

3.4.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.30/6, 92FUND/EXC.30/6/Add.1 and 92FUND/EXC.30/6/Add.2.

Amount available for compensation

3.4.2 The Committee recalled that the Commercial Court in Nantes had determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 (£8.7 million).

3.4.3 It was also recalled that the maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention (135 million SDR) had been calculated by the Director, following the instructions by the Executive Committee, at FFr1 211 966 811 corresponding to €184 763 149 (£125 million), that the Executive Committee had endorsed this calculation at its April 2000 and October 2001 sessions and that in October 2000 and October 2001 the Assembly had endorsed the Committee's decision.

3.4.4 The Committee recalled that TotalFinaElf had undertaken not to pursue claims against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer relating to its costs arising from operations in respect of the wreck, the clean-up of shorelines and disposal of oily waste, and a publicity campaign to restore the image of the Atlantic coast, if and to the extent that the presentation of such claims would result in the total amount of all claims arising out of this incident exceeding the maximum amount of compensation available under the 1992 Conventions.

3.4.5 It was recalled that the French Government had also undertaken not to pursue claims for compensation against the 1992 Fund or the limitation fund established by the shipowner or his insurer if and to the extent that the presentation of such claims would result in the maximum amount available under the 1992 Conventions being exceeded but that the French Government's claims would rank before any claims by TotalFinaElf if funds were available after all other claims had been paid in full.

3.4.6 It was recalled that the Executive Committee had authorised the Director to make payments to the French State to the extent that he considered that there was a sufficient margin between the total amount of compensation available and the 1992 Fund's exposure in respect of other claims (document 92FUND/EXC.22/14, paragraph 3.4.11). It was also recalled that the 1992 Fund had made two payments to the French State totalling €16 070 342 (£11 118 000).

3.4.7 It was noted that the Director was reviewing the situation in order to establish whether there was a sufficient margin to enable the 1992 Fund to make a further payment to the French State.

Claims situation

3.4.8 The Committee noted that as at 10 September 2005, 6 978 claims for compensation had been submitted for a total of €208 million (£141 million) and that 94.8% of the claims had been assessed.

3.4.9 It was noted that payments for compensation had been made in respect of 5 603 claims for a total of €100.4 million (£69 million), out of which the shipowner's insurer, Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual) had paid €12.8 million (£8.8 million) and the 1992 Fund €87.6 million (£60.2 million). It was also noted that 816 claims, totalling €24.8 million (£16.8 million), had been rejected.

Legal proceedings

3.4.10 The Executive Committee recalled that a number of court actions for compensation had been brought in various jurisdictions in France.

3.4.11 The Committee noted that claims totalling €497 million (£337 million) had been lodged against the shipowner's limitation fund constituted by Steamship Mutual and that this amount included a claim by the French Government at €190.5 million (£129 million) and by TotalFinaElf at €170 million (£115 million). It was however noted that most of these claims, other than those of the French Government and TotalFinaElf, had been settled, and that therefore it appeared that these claims should be withdrawn against the limitation fund to the extent that they related to the same loss or damage. It was recalled that the 1992 Fund had received formal notification from the liquidator of the limitation fund of the claims lodged against that fund.

3.4.12 The Committee recalled that legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 795 claimants. It was noted that by 10 September 2005 out-of-court settlements had been reached with 423 of these claimants and that actions by 328 claimants (including 139 salt producers) were pending. It was also noted that the total amount claimed in the pending actions, excluding the claims by the French State and TotalFinaElf, was €65 million (£44 million).

3.4.13 The Committee noted that the 1992 Fund would continue to hold discussions with the claimants whose claims were not time-barred and were admissible in principle for the purpose of arriving at out-of-court settlements.

Court survey relating to the claims by salt producers

3.4.14 It was recalled that claims for lost salt production due to delays to the start of the 2000 season caused by the imposed ban on water intake had been received from salt producers (both independent and members of a co-operative) in Guérande and Noirmoutier as well as for losses caused by the late start of the 2001 season. It was further recalled that claims had also been presented for costs of restoration of salt ponds in Guérande in 2001, as well as for the loss of production during 2001. The Committee recalled that the experts engaged by the 1992 Fund and Steamship Mutual had considered that salt production was possible in 2000, but that as a result of the interruption caused by the ban on water intake, the maximum yield would have been 20% of that expected for the year. It was also recalled that interim compensation payments had been made to the claimants on the basis of 20% lost production.

3.4.15 The Committee recalled that at the request of the 1992 Fund and Steamship Mutual, a court expert had been appointed to examine whether it would have been feasible to produce salt in 2000 in Guérande that would meet the criteria relating to quality and the protection of human health. It was recalled that the court expert had concluded that salt production would have been feasible in 2000, but that as a result of the bans that were imposed, the maximum yield would have been between 4% and 11% of normal production.

3.4.16 It was noted that the 1992 Fund had approached claimants to explore the possibility of reaching out-of-court settlements in light of the court expert's findings. It was noted that out-of-court settlements had been reached with 21 of the salt producers on the basis of a loss of production of 95%, and that these salt producers had withdrawn their claims in relation to the restoration of ponds.

Court judgements in respect of claims against the 1992 Fund

3.4.17 The Committee took note of the information contained in documents 92FUND/EXC.30/6/Add.1 and 92FUND/EXC.30/6/Add.2 concerning judgements in various French Courts in respect of claims against the 1992 Fund, the shipowner and Steamship Mutual.

Claim by a student who had failed to obtain expected employment, allegedly due to the Erika incident

3.4.18 The Committee noted that a claim for loss of income for €978 (£650) had been presented by a student who, contrary to what had been the case in 1998 and 1999, had not been employed in the summer of 2000 at a camping site in Névez, Department of Finistère, as a kitchen assistant. It was noted that this claim had been rejected by the 1992 Fund on the ground that there was not a sufficient link of causation between the alleged loss and the oil pollution resulting from the *Erika* incident.

3.4.19 The Committee noted that the student had brought legal action in the Commercial Court in Rennes maintaining that, had it not been for the *Erika* incident, he would, as in previous years, have been employed at the camping site. It was also noted that he had maintained that, as he lived in Névez where the camping site was located, it was inconceivable for him to work in any

other area, since the costs he would have incurred would have absorbed the major part of his salary and that since seasonal workers were engaged many months in advance, it had been too late for him to find alternative employment by the time it had been established that the 2000 tourist season would be affected by the oil pollution.

3.4.20 The Committee noted that in the proceedings the 1992 Fund had argued that the claim did not fulfil the Fund's criteria for admissibility and that, in any event, as a seasonal worker the student should have been able to find work outside the area affected by the oil spill.

3.4.21 It was noted that the Commercial Court had considered that the camping site was located in the contaminated area and that its activities had been greatly affected by the oil spill. The Committee noted that the Court had therefore concluded that the student's activity at the camping site was highly integrated with the economy of the affected area, that as a student he was very dependant on this employment and that he could not have taken other employment as a kitchen assistant, since this would have made it necessary for him to leave the place where his parents lived and that for this reason it would not have been possible for him to find alternative, similar employment. It was noted that the Court had accepted the claim and had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay the claimed amount of €978 (£650) plus legal interest and an amount of €3 000 (£2 000) in costs. It was also noted that the Court had decided that the judgement was immediately enforceable whether or not an appeal was lodged.

3.4.22 The Committee noted that this claim, although for a very low amount, gave rise to a question of principle, namely whether claims by persons who as a result of an oil pollution incident were laid off work or had not been given expected employment were admissible for compensation under the 1992 Conventions.

3.4.23 It was noted that the 1992 Fund had not yet been notified of the judgement, which made it possible for the Executive Committee to decide whether an appeal should be lodged but that since the Court had declared that, whether or not appealed, the judgement was enforceable, the 1992 Fund would in any event pay the awarded amount plus interest and costs.

3.4.24 The Committee noted that in the context of the *Prestige* incident claims had been presented for loss of income by employees in the fisheries sector, which had given rise to the same policy issue.

3.4.25 The Committee took note of the previous considerations by the 1971 Fund Executive Committee of the issue in the context of the *Aegean Sea* and *Braer* incidents, and the considerations by the 1971 Fund 7th Intersessional Working Group and the 1971 Fund Assembly as reproduced in paragraphs 1.3.7 to 1.3.23 of document 92FUND/EXC.30/6/Add.1.

3.4.26 It was recalled that when, at its June 1993 session, the 1971 Fund Executive Committee had considered certain claims arising from the *Aegean Sea* and *Braer* incidents by employees at fish processing plants, mussel plants and shellfish purification plants who had either been placed on part-time working or had been made redundant, it had taken the view that the losses suffered by employees were a more indirect result of contamination than losses suffered by companies or the self-employed, since the losses of employees were the result of their employers being affected by the consequences of a spill and therefore having to reduce their workforce. It was further recalled that reference had been made to the fact that, although the 1971 Fund Executive Committee had at a previous session accepted claims from fish processing plants, the losses suffered by their employees had been considered one step more remote than losses suffered by fish processors. It was recalled that the Committee had concluded that such losses could not be considered as 'damage caused by contamination' and therefore did not fall within the definition of 'pollution damage' (document FUND/EXC.35/10, paragraphs 3.3.23 and 3.4.24).

3.4.27 It was recalled that when this issue had been considered by the 1971 Fund opinions had been split both in the Executive Committee and in the intersessional Working Group. It was recalled

that on the one hand it had been argued that the losses suffered by employees being laid off were a more indirect result of the contamination than losses suffered by companies and the self-employed and that such losses could not be considered as damage by contamination. It was also recalled that on the other hand it had been suggested that the decisive criteria should be whether the activity in question had been affected by the spill and not the corporate structure. It was further recalled that during the discussions in the Working Group some delegations had maintained that an employer's action to lay off staff should be considered as measures taken to minimise his loss and that the loss suffered by the employees should therefore be considered as 'loss or damage caused by preventive measures', which would qualify for compensation under Article I.6 of the Civil Liability Convention. It was, however, recalled that as set out above, the Executive Committee had taken the decision that claims by such employees were not admissible, and that this had therefore been the IOPC Funds' policy.

3.4.28 It was recalled that the 1992 Fund Assembly had decided, at its 1st session held in June 1996, that the criteria hitherto laid down by the 1971 Fund Executive Committee should be applied by the 1992 Fund in its consideration of the admissibility of claims (1992 Fund Resolution N°3, document 92FUND/A.1/34, Annex II).

3.4.29 The Committee noted that, in the Director's view, the decisive issue was whether there was a sufficiently close link of causation between the contamination and the losses suffered by employees who had been laid off or placed on part-time work and therefore had suffered what is known as 'pure economic loss' (ie economic loss suffered by persons whose property had not been contaminated by the oil).

3.4.30 One delegation questioned whether the Executive Committee was the competent body to address issues relating to the Fund's claims policy. The Director drew the Committee's attention to Resolution N°5 on the Establishment of the 1992 Fund Executive Committee, which stated that the functions of the Committee should *inter alia* be to consider new issues of principle and general policy questions relating to claims for compensation as they arose (and not in the abstract) and procedures for handling incidents involving the 1992 Fund. The Committee noted the Director's view that the Executive Committee had a clear mandate to take decisions on claims and matters of principle such as the one under discussion.

3.4.31 The Executive Committee decided that it was competent to consider policy issues in respect of claims for compensation.

3.4.32 Some delegations that had been in favour of admitting claims by employees when they were considered by the 1971 Fund Executive Committee in relation to the previous incidents and further considered by the 7th intersessional Working Group, reaffirmed their view that claims by employees who had been made redundant should be admissible in principle. Those delegations considered, however, that a distinction should be made between workers that had a contract of employment and those that merely had an expectation of employment. The point was made that the student fell into the latter category, that there was an insufficient link of causation between the loss and the pollution and that his claim was therefore inadmissible.

3.4.33 Most delegations considered that despite the fact that the claim was for a small amount in comparison with the likely legal costs involved in an appeal, an important question of principle was involved and for that reason it was necessary to go ahead with the appeal. Those delegations considered that because the claim was merely based on an expectation of employment, the decisive factor was the lack of a link of causation and not a question of whether or not it was a 'second degree tourism claim'.

3.4.34 Although there was insufficient support for revising the Fund's policy at this time as regards the admissibility of claims by employees laid off or made redundant, a number of delegations made the point that the Fund's admissibility criteria were not set in stone and that it would be appropriate to review the criteria from time to time so as to ensure that they remained relevant and up to date.

3.4.35 The Committee decided that the Fund's policy regarding claims for losses suffered by employees laid off temporarily, put on part-time work or made redundant should not be changed and that the Fund should continue to reject such claims.

3.4.36 The Committee instructed the Director to appeal against the judgement in respect of the student that had been unable to obtain the anticipated employment at the camping site as a result of the incident.

Second-degree tourism claims

3.4.37 The Executive Committee noted a judgement by the Commercial Court in La Roche sur Yon in respect of a company selling water sports equipment for losses suffered in its dual activity of selling such equipment to individual tourists and to sailing schools in Vendée. It was noted that the Fund had accepted as admissible in principle the claim for loss of income from reduced sales to tourists, but had rejected the claim for loss of sales to sailing schools on the ground that such sales related to services provided to other businesses in the tourism industry but not directly to tourists.

3.4.38 The Committee noted that the Court had stated that it was not bound by the 1992 Fund's criteria for admissibility and that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it to the individual claim by determining whether there was a sufficient link of causation between the event that led to the damage ('le fait générateur') and the losses suffered, and by assessing the extent of the damage suffered by the victims according to the criteria of French law. It was noted that the Court had held that there was no doubt that there was a link of causation between the contamination caused by the *Erika* incident and the loss suffered and had stated that the loss incurred could not be doubted and was real and directly linked to the contamination. It was further noted that for these reasons the Court had accepted the claimed amount in its entirety and ordered the Fund to compensate the claimant accordingly.

3.4.39 The Committee recalled that as regards claims in the tourism sector, the governing bodies had decided as follows (Claims Manual, 2005 edition, page 28):

> A distinction is made between (a) claimants who sell goods or services directly to tourists (for example the owners of hotels, campsites, bars and restaurants) and whose businesses are directly affected by a reduction in visitors to the area affected by an oil spill, and (b) those who provide goods or services to other businesses in the tourist industry but not directly to tourists (for example wholesalers, manufacturers of souvenirs and postcards and hotel launderers). It is considered that in the case of category (b) there is not a sufficiently close link of causation between the contamination and any losses suffered by claimants. Claims of this type will therefore normally not qualify for compensation in principle.

3.4.40 The Committee noted the Director's view that the sales to sailing schools fell within the second category above ('second degree tourism claims') and should therefore not normally qualify for compensation in principle. The Committee decided that, since there were no particular facts in this case that would justify a departure from the position taken by the Funds, the claim was inadmissible, and in spite of the modest amount involved, endorsed the Director's proposal that the 1992 Fund should appeal against the judgement.

Seasonal lettings activities

3.4.41 The Committee noted four judgements by the Commercial Court in La Roche sur Yon in respect of claims by estate agencies in Vendée for losses suffered in their seasonal lettings of apartments in 2000, allegedly as a consequence of the reduction in the number of tourists in the affected area due to the *Erika* incident.

3.4.42 The Committee noted that the Court had made the same statements concerning the 1992 Fund's criteria for admissibility and the interpretation of the concept of 'pollution damage' in the 1992 Conventions as set out in paragraph 3.4.38. It was also noted that the Court had awarded the full claimed amounts to three of the four claimants and had decided that the judgements were immediately enforceable, whether or not appeals were lodged. It was further noted that in the case of the claimant whose claim had been rejected by the 1992 Fund, the Court had awarded the claimant an amount of €11 696 (£7 900), compared to the claimed amount of €25 383 (£17 200).

3.4.43 The Committee noted the Director's observation that in these four cases the question was not of the Fund's admissibility criteria but only of the evaluation of the quantum. The Committee also noted that with respect to three of the claims the Court had not made any assessment of the losses suffered but had accepted the amounts claimed, as calculated by the claimants' accountants. It was also noted that as regards the fourth claim, the Fund had concluded that no loss had been suffered, whereas the Court had accepted a figure of €11 696 (£7 900), ie lower than the claimed amount, without a clear explanation as to how the amount had been arrived at.

3.4.44 The Committee endorsed the Director's intention to instruct the 1992 Funds' experts to examine the judgements and advise him as to whether the amounts awarded by the Courts, or some of them, were not unreasonable, in order to enable him to decide whether the Fund should lodge appeals.

3.5 *Al Jaziah 1*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.30/7 (cf document 71FUND/AC.17/12/3) concerning the *Al Jaziah 1* incident which had occurred in the United Arab Emirates and which involved both the 1992 and the 1971 Funds.

3.5.2 It was recalled that the *Al Jaziah 1* had not been covered by any liability insurance, that claims totalling £1.4 million had been submitted to the Funds in relation to clean-up and pollution prevention and that these claims had been settled at £1.1 million and had been paid by the Funds. The Committee recalled that the Funds would not be required to make any further compensation payments.

3.5.3 It was recalled that, at their October 2002 sessions, the governing bodies of the 1992 and 1971 Funds had decided that the Funds should pursue recourse action against the shipowner (documents 92FUND/EXC.18/14, paragraph 3.5.9 and 71FUND/AC.9/20, paragraph 15.10.9).

3.5.4 The Executive Committee recalled that the Funds had commenced legal action in the Abu Dhabi Court of first instance against the shipowning company and its sole proprietor in January 2003, requesting that the defendants should be ordered to pay Dhs6.4 million (£0.95 million) to the Funds, the amount to be distributed equally between the 1971 Fund and the 1992 Fund.

3.5.5 It was recalled that in November 2003 the Abu Dhabi Court of first instance had issued a preliminary judgement appointing an expert to investigate the nature of the incident and the payments made by the Funds. It was also recalled that the Funds and their lawyers had met with the expert on two occasions and had provided supplementary information as requested by the expert.

3.5.6 The Committee noted that in August 2005, the Funds' lawyers in the UAE had reported that the expert had informed the Court that he could not complete his report due to other commitments. It was also noted that in September 2005 the Court had appointed a new expert and that in early October the Funds and their lawyers had met with him and provided him with all the background material surrounding the incident.

3.6 *Slops* and Incident in Sweden

3.6.1 The Executive Committee took note of the information contained in document 92FUND/EXC.30/8 in respect of the *Slops* incident and an incident in Sweden.

Slops

3.6.2 It was recalled that at its July 2000 session the Executive Committee had decided that the *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

3.6.3 It was recalled that two companies that had carried out clean-up operations had taken legal action in the Court of first instance in Piraeus (Greece) against the registered owner of the *Slops* and the 1992 Fund claiming compensation for the costs of clean-up and preventive measures. It was recalled that in December 2002 the Court had rendered a default judgement against the registered owner for the amounts claimed. It was also recalled that as regards the action against the Fund, the Court had held that the *Slops* fell within the definition of 'ship' and had ordered the Fund to pay the companies the amount claimed, plus legal interest.

3.6.4 The Committee recalled that the 1992 Fund had appealed and that in February 2004 the Court of Appeal had overturned the judgement of the Court of first instance and rejected the claims against the 1992 Fund on the grounds that the *Slops* did not meet the criteria required by the Conventions and therefore could not be considered a 'ship'.

3.6.5 It was recalled that the claimants had appealed to the Supreme Court arguing that the *Slops*, which by its construction had all the characteristics of a vessel carrying oil, had been anchored and used as a floating receiving and separating unit for oil products transferred from other vessels. It was recalled that the claimants had stated that as a result of fire, a large quantity of oil loaded in bulk as cargo in the vessel's cargo tanks had been spilled. The Committee also recalled that the claimants had maintained that the Court of Appeal had made an incorrect interpretation of the definition of 'ship' in the 1992 Civil Liability Convention and that the wording of the definition and its purpose was not only to prevent pollution but also to compensate victims of oil pollution and those who contributed to the prevention of such pollution. It was recalled that the claimants had further maintained that the definition of 'ship' also covered a craft which, by its construction, was designed to carry oil and which at the time of the incident did not perform voyages and (for a brief or longer period of time) was stationary, operating as a receiving and separating unit for oil or oily residues and carrying oil in its cargo tanks, particularly so when the craft had oily residues from the carriage on board and constituted a high risk of causing pollution in vital areas such as ports. It was also recalled that the claimants had expressed the view that the Court of Appeal had, in holding that it could not support the view that there were oil residues from the *Slops*' last voyage at the time of the incident, considered an issue that had not been pleaded. It was further recalled that the claimants had argued that the definition of 'ship' introduced a rebuttable presumption that there were residues on board and that the 1992 Fund had not rebutted this presumption.

3.6.6 The Executive Committee noted that the 1992 Fund had submitted pleadings to the Supreme Court in May 2005 maintaining that the Court of Appeal had interpreted the definition of 'ship' correctly and that the appeal should be dismissed. It was noted that in its pleadings before the Supreme Court the Fund had put forward largely the same arguments as in the Court of Appeal, reiterating the point made to the Court of Appeal that it was not possible that the residues from previous voyages had remained onboard in view of the fact that the *Slops* had been converted to a floating oil recovery facility and maintaining that in any event the alleged rebuttable presumption would not apply in this case. It was also noted that the Fund had drawn the Supreme Court's attention to Resolution N°8 adopted in May 2003 by the 1992 Fund Administrative Council in which the Council had expressed the view that the courts of States Parties to the 1992 Conventions should take into account the decisions of the governing bodies

of the 1992 Fund and the 1971 Fund relating to the interpretation and application of the Conventions.

3.6.7 The Committee noted that in support of its position the 1992 Fund had submitted to the Supreme Court an expert opinion by Dr Thomas A Mensah (Former Assistant Secretary-General of IMO, former President of the International Tribunal for the Law of the Sea in Hamburg (Germany)). It was noted that in his opinion, Dr Mensah had concluded that there was no basis, either in the provisions and terms of the 1992 Civil Liability Convention and the 1992 Fund Convention or in international maritime law or in the rules and principles of international law concerning the interpretation and application of treaties, for suggesting that the *Slops* could be considered as a 'ship' in relation to the incident. It was noted that in his view at the time of the incident the *Slops* did not meet any of the requirements for a ship as defined in Article I.1 of the 1992 Civil Liability Convention because it was not 'a seagoing vessel and seaborne craft… constructed or adapted for the carriage of oil in bulk as cargo' nor was it a ship that was 'actually carrying oil in bulk as cargo' or on 'any voyage following such carriage' and therefore pollution damage resulting from the incident could not be considered as falling within the scope of application of the 1992 Civil Liability Convention and there could be no obligation on the part of the 1992 Fund in respect of compensation for such pollution damage.

3.6.8 The Committee noted that in September 2005 the five Supreme Court judges who had heard the case had concluded that the question as to whether or not the Court of Appeal had correctly interpreted and applied Article I.1 of the 1992 Civil Liability Convention should be referred to the Plenary Session of the Supreme Court. It was also noted that under the Greek Code of Civil Procedure in order for a judgement by a Division of the Supreme Court to be conclusive and binding, the judgement must be decided by a majority of more than one vote. It further noted that it had appeared that three judges had been in favour of the claimants and two had been in favour of the 1992 Fund. It was noted that the Plenary Session would be composed of one half of the judges of the Supreme Court, who would be chosen randomly. It was further noted that only the issue of the interpretation and application of the Article I.1 would be considered by the Plenary Session, the remaining three grounds of appeal put forward by the claimants having been rejected by the Division of the Supreme Court.

Incident in Sweden

3.6.9 The Committee recalled that in September and early October 2000 persistent oil had landed on the shores of two islands to the north of Gotland in the Baltic Sea and on several islands in the Stockholm archipelago and that the Swedish authorities had undertaken clean-up operations. It was recalled that investigations by the Swedish authorities had indicated that the oil could have been discharged within the Swedish Exclusive Economic Zone to the east of Gotland, possibly from the Maltese tanker *Alambra*, which had passed the area at the assumed time of the oil spill on a ballast voyage to Tallinn (Estonia). It was further recalled that, according to the Swedish Coastguard, analyses of oil samples from the polluted islands matched those taken from the *Alambra*. The Committee also recalled that the shipowner and his insurer had maintained that the oil did not originate from the *Alambra*.

3.6.10 It was recalled that the Swedish authorities had incurred costs in respect of clean-up operations totalling SEK5.2 million (£380 000) and that therefore the aggregate amount of the claims would fall well below the limitation amount applicable to the *Alambra*, 32 684 760 SDR (£22 million).

3.6.11 The Committee recalled that in September 2003 the Swedish Government had taken legal action in the Stockholm District Court against the shipowner and his insurer maintaining that the oil in question originated from the *Alambra* and claiming compensation of SEK5.3 million (£385 000) for clean-up costs. It was further recalled that the Government had also taken legal action against the 1992 Fund as a protective measure to prevent its claim against the Fund becoming time-barred, invoking the liability of the 1992 Fund to compensate the Government if neither the shipowner nor the insurer were to be held liable to pay compensation.

3.6.12 The Committee noted that, following a request by the 1992 Fund, the District Court had decided that the action against the Fund should be suspended until the action against the shipowner/London Club had been heard.

3.6.13 It was noted that in May 2005 the Court had, at the request of the shipowner and the London Club, granted a postponement of the proceedings to give the parties time to negotiate an out-of court settlement.

3.7 *Prestige*

3.7.1 The Executive Committee took note of the information regarding the *Prestige* incident contained in documents presented by the Director (documents 92FUND/EXC.30/9, 92FUND/EXC.30/9/1 and 92FUND/EXC.30/9/2) and by the Spanish delegation (document 92FUND/EXC.30/9/3).

CLAIMS FOR COMPENSATION

Spain

3.7.2 The Committee noted that as at 20 September 2005 the Claims Handling Office in La Coruña established by the 1992 Fund and the shipowner's insurer, the London Steamship Owners Mutual Insurance Association (London Club), had received 741 claims totalling €829 million (£561 million), including a claim for €132 million (£89 million) from a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters and five claims from the Spanish Government totalling €662.5 million (£449 million).

3.7.3 It was noted that of the 736 claims submitted, excluding the Spanish Government's claims, 65% had been assessed. It was also noted that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. It was also noted that 414 of these claims for €23.4 million (£16 million) had been approved for €2.4 million (£1.6 million), that interim payments totalling €83 118 (£56 000)[<2>] had been made at 15% of the assessed amounts in respect of 79 of the approved claims and that the remaining approved claims were awaiting a response from the claimants or were being re-examined following claimants' disagreement with the assessed amount. It was also noted that 117 claims for €10 million (£6.8 million) had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered.

3.7.4 It was recalled that the first claim from the Spanish Government, submitted in October 2003, was for €383.7 million (£260 million), the second, submitted in January 2004, for €44.6 million (£30 million), the third, submitted in April 2004, for €85.5 million (£58 million), the fourth, submitted in two parts, the first in December 2004 and the second in April 2005, for €157.2 million (£106 million) and the fifth for €87.8 million (£59 million). It was recalled that the first, second and third claims included items for the cost of clean-up operations in the Atlantic National Park amounting to €11.9 million (£8 million) and that these items had been withdrawn, since funding for these operations had been obtained from another source. It was noted that this withdrawal, together with subsequent amendments, had brought the total of the amount claimed by the Spanish Government to €662.5 million (£449 million).

3.7.5 It was recalled that the claims submitted by the Spanish Government related to costs incurred in respect of at sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns.

[<2>] Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

3.7.6 It was recalled that the first claim received from the Spanish Government had been assessed by the Director in December 2003 on an interim basis at €107 million (£72 million) and that a payment of €16 050 000 (£11.1 million), corresponding to 15% of the assessed amount, had been made in December 2003. It was also recalled that the Director had made a general assessment of the total of the admissible damage in Spain at €303 million (£206 million) and that, as authorised by the Assembly, he had also made in December 2003 a further payment of €41 505 000 (£28.8 million) to the Spanish Government against a bank guarantee provided by a Spanish bank, bringing the total amount paid by the 1992 Fund to the Spanish Government to €57 555 000 (£39.9 million).

3.7.7 It was recalled that at the Executive Committee's May 2004 session the Spanish delegation had stated that 67 municipalities had requested compensation totalling €37.6 million (£25.5 million), that the four affected autonomous regions had estimated their damage at €150 million (£102 million) and that the claimed amounts were awaiting approval by the State before payments were made to these public authorities. It was also recalled that in May 2005, 52 municipalities in Galicia had signed agreements with the Spanish Government, that a further three were expected to sign agreements in the near future and that another 20 municipalities in Asturias had accepted proposals made by the Spanish Government. It was further recalled that at the Executive Committee's June 2005 session, the Spanish delegation had informed the Committee that the Spanish Government would submit claims for the costs incurred by autonomous regions and municipalities that had been paid by the Government, for the costs incurred in the disposal of the oily residues and for the payments in relation to the claims submitted under the Royal Decrees that were being assessed by the Consorcio de Compensación de Seguros (Consorcio), a state-owned insurance organisation set up to pay claims for damage not normally covered by commercial insurance policies (cf paragraphs 3.7.22-3.7.24 below) by the end of 2005 or early in 2006.

France

3.7.8 The Committee noted that by 20 September 2005, the Claims Handling Office in Bordeaux established by the 1992 Fund and the London Club had received 410 claims totalling €97 million (£66 million), of which 73% had been assessed. It was noted that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. It was also noted that 271 claims had been approved for €5.9 million (£4 million), that interim payments totalling €703 543 (£476 000) had been made at 15% of the assessed amounts in respect of 117 of the approved claims and that the remaining approved claims awaited a response from the claimants or were being reexamined following claimants' disagreement with the assessed amount. It was also noted that 55 claims had been rejected, the majority because the claimants had not demonstrated that a loss had been suffered.

3.7.9 It was noted that 104 oyster farmers based in the Arcachon basin near Bordeaux had submitted claims totalling €807 037 (£547 000) for losses allegedly suffered as a result of market resistance due to the pollution. It was also noted that 91 of these claims, totalling €701 686 (£475 000), had been assessed at €263 253 (£179 000), that payments totalling €16 343 (£11 000) had been made in respect of 28 of these claims at 15% of the assessed amounts and that the remaining thirteen claims were being examined by the experts engaged by the 1992 Fund and the London Club ('joint experts').

3.7.10 It was noted that, in September 2005, representatives of the 1992 Fund and the joint experts had met the Association Interprofessionelle pour le Development de la Peche Artisanale (ASSIDEPA), representing the fishery claimants, and the Centre de Gestion et de Comptabilité Agricole (CGCA), representing the oyster farmer claimants. It was also noted that the problems encountered in assessing the outstanding claims had been discussed between these representatives and the representatives of the 1992 Fund and that a representative of each association had been nominated to hold further discussions with the joint experts in order to complete the outstanding assessments as soon as possible.

3.7.11 The Committee noted that the Claims Handling Office had received 164 tourism-related claims totalling €17.9 million (£12 million), that 118 of these claims had been assessed at a total of €5.2 million (£3.5 million), that 100 claims had been approved for €4.5 million (£3 million) and that interim payments totalling €550 859 (£373 000) had been made at 15% of the assessed amounts in respect of 62 claims.

3.7.12 It was noted that the joint experts were assessing a claim submitted by the French Government in May 2004 for €67.5 million (£45.7 million) in relation to the costs incurred for clean-up and preventive measures. It was recalled that in October 2004 representatives of the 1992 Fund and the Fund's experts had met with representatives of the French Government to discuss the assessment process and what further information was required for the assessment to be completed. The Committee noted that after a preliminary assessment of the Government's claim had been made, a formal request for further information had been sent to the French Government in August 2005.

3.7.13 The Committee noted that a further 38 claims, totalling €7.7 million (£5.2 million), had been submitted by local authorities for costs of clean-up operations, that 20 of these claims had been assessed at €3.4 million (£2.3 million), that 14 claims had been approved for €962 037 (£651 000) and that interim payments totalling €120 889 (£82 000) had been made in respect of 10 claims at 15% of the assessed amounts.

Portugal

3.7.14 The Committee recalled that in December 2003 the Portuguese Government had submitted a claim for €3.3 million (£2.2 million) in respect of clean-up and preventive measures. It was recalled that a meeting had been held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved and that in February 2005 the Portuguese Government had provided the 1992 Fund with additional documentation in support of its claim. It was noted that the additional documentation included a supplementary claim for €1 million (£677 000) also in respect of clean-up and preventive measures. It was noted that the claims had been provisionally assessed at €1.5 million (£1 million).

TIME BAR

3.7.15 The Committee recalled that under the 1992 Civil Liability Convention, rights to compensation from the shipowner and his insurer became extinguished unless legal action was brought within three years of the date when the damage occurred (Article VIII) and that under the 1992 Fund Convention rights to compensation from the 1992 Fund became extinguished unless the claimant either brought legal action against the Fund within this three-year period or notified the Fund within that period of an action against the shipowner or his insurer (Article 6). It was also recalled that both Conventions provided that in no case should legal actions be brought after six years from the date of the incident.

3.7.16 The Committee noted that in September 2005 individual letters had been sent to all those who had submitted claims to the Claims Handling Offices in Spain and France and with whom settlements had not been reached by that time about the time bar issue. It was also noted that advertisements had been placed in the national and local press in Spain and France drawing attention to the time bar issue. It was noted that in respect of the *Prestige* incident there could be uncertainty as to the date from which the three year time bar period would start to run for an individual claimant (ie the date when the respective claimant's loss had occurred) and that in view of this uncertainty it had been suggested in the letters and in the advertisements that the claimants should assume that the time bar period commenced on the day of the incident (ie 13 November 2002) in order to avoid any risk of the claims becoming time-barred. The Committee noted that in the texts of the letters and advertisements it had also been made clear that even if a claimant had taken legal action, this would not prevent further discussions concerning his or her claim for the purpose of reaching an out-of-court settlement.

3.7.17 It was noted that at the meeting in September 2005 with the representatives of ASSIDEPA and CGCA referred to in paragraph 3.7.10 above, the 1992 Fund's representative had taken the opportunity to draw the attention of the representatives of these claimants to the impending third anniversary of the incident and to the steps that had to be taken by those claimants whose claims had not been settled by 13 November 2005 to prevent their claims becoming time-barred.

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE SPANISH AUTHORITIES

3.7.18 It was recalled that the Spanish Government and regional authorities had made payments of €40 (£27) per day to all those directly affected by the fishing bans, including shellfish harvesters, inshore fishermen and associated onshore workers with a high dependence on the closed fisheries, such as fish vendors, fishing net repairers and employees of fishing co-operatives, fish markets and ice factories and that some of these payments had been included in subrogated claims by the Spanish authorities pursuant to Article 9.3 of the 1992 Fund Convention.

3.7.19 It was also recalled that the Spanish Government had provided aid to other individuals and businesses affected by the oil spill in the forms of loans, tax relief and waivers of social security payments.

3.7.20 The Committee recalled that in June 2003 the Spanish Government had adopted legislation in the form of a Royal Decree (Real Decreto-Ley) making available €160 million (£108 million) to compensate in full the victims of the pollution and that the Decree had provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions. It was further recalled that to receive compensation the claimants had had to submit their claims by 31 December 2003, renounce the right to compensation in any other way in relation to the *Prestige* incident and transfer their rights of compensation to the Spanish Government. It was also recalled that in July 2004, by another Royal Decree, the funds available for compensation had been increased to €249.5 million (£169 million), and also the period in which persons in the fishing, shellfish harvesting and aquaculture sectors could claim for losses suffered directly as a result of the incident had been extended to include 2004.

3.7.21 It was recalled that at the February 2004 session of the Executive Committee the Spanish delegation had informed the Committee that the Spanish Government had received almost 29 000 claims for compensation from victims of the *Prestige* incident who wished to use the payment mechanism set out in the first Royal Decree. It was also recalled that of those claims, some 22 800 related to groups of workers in the fisheries sector which would be assessed by means of a system using either a formula or a scale and that some 5 000 claims of other groups would be subject to individual assessments. The Committee noted that in May 2005 the Spanish Government had informed the 1992 Fund that agreements had been reached with some 19 500 workers in the fisheries sector and that payments totalling some €88 million (£60 million) had been made to them under the Royal Decrees.

3.7.22 The Committee recalled that the 1992 Fund had been informed by the Spanish Government in 2004 that claims which under the Decrees would be subject to individual assessment would be assessed by the Consorcio referred to in paragraph 3.7.7. It was noted that 971 claims for a total of €229.9 million (£156 million) had been received by the Consorcio relating to some 3 700 persons.

3.7.23 It was noted that since the Royal Decrees provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings had been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria.

3.7.24 The Committee noted that the Consorcio had requested the assistance of the joint experts in the assessment of 243 of these claims. It was noted that many of the claims that had been referred

to these experts were not supported by sufficient evidence to demonstrate the loss claimed and that the Consorcio had requested further evidence and information from the claimants. It was also noted that the experts of the Consorcio and the joint experts had made joint assessments of 161 claims of which the 1992 Fund and the London Club had approved 148. The Committee noted that 134 claims in respect of which the Consorcio had requested assistance had also been submitted directly to the Claims Handling Office in La Coruña and had been approved by the London Club and the 1992 Fund. The Committee further noted that details of 83 of these assessments had been provided, with the approval of the claimants, to the Consorcio. It was also noted that further assessments were in progress.

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE FRENCH AUTHORITIES

3.7.25 The Committee recalled that the French Government had introduced a scheme to provide payments in excess of the amounts paid by the 1992 Fund to claimants in the fishery and shellfish harvesting sectors who had made a request to that effect by 13 December 2004. It was noted that payments had been made in January 2005 to 175 claimants for a total of €1 153 621 (£781 000).

3.7.26 The Committee noted that the French Government had informed the Director that these payments were advances on the payments to be made by the 1992 Fund and were to be repaid by the claimants and that the Government would not pursue subrogated claims against the 1992 Fund in respect of the payments made.

AMOUNT AVAILABLE FOR COMPENSATION

3.7.27 The Committee recalled that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was €22 777 986 (£15.7 million) and that on 28 May 2003 the shipowner had deposited that amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund.

3.7.28 It was recalled that the maximum amount of compensation available under the 1992 Conventions in respect of this incident, 135 million SDR, corresponded to €171 520 703 (£118 million), including the amount actually paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention).

COURT ACTIONS

Spain

3.7.29 The Committee noted that some 2 020 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain), 213 of which involved persons who had submitted claims directly to the London Club and 1992 Fund through the Claims Handling Office in La Coruña. It was noted that no details of the losses suffered had been provided to the Court. It was also noted that it was expected that claimants who had settled with the Spanish Government under the Royal Decrees would withdraw their claims from the court proceedings.

3.7.30 It was noted that on 23 September 2005, the legal representative of the largest group of victims in the fisheries, shellfish harvesting and fish-farming sector had submitted a document to the Instructing Magistrate in Corcubión in which it was stated that he had signed settlement agreements with the General Administration of the Spanish State, and that in accordance with those agreements, any action or compensation to which the victims could be entitled as a result of the *Prestige* incident, against the Spanish State as well as against the 1992 Fund, were waived. It was noted that the waiver affected approximately 13 700 persons, covering approximately 75% of the fisheries sector affected by the *Prestige* incident.

3.7.31 It was noted that the Court of first instance and Instructing Magistrate N°1 in Corcubión had issued a decision on 20 May 2005, declaring the direct civil liability of the company Universe

Maritime Ltd and ordering the company to provide a security of €87.7 million (£59 million). It was noted that so far the decision had not been appealed by the company concerned, and that for this reason the Spanish Administration had not been able, in the corresponding opposition to the appeal, to state that the 1992 Civil Liability Convention and the 1992 Fund Convention were fully applicable under Spanish law.

3.7.32 The Committee noted that on 30 September 2005, the Spanish State had lodged a claim in the Court of first instance and to the Instructing Magistrate N°1 in Corcubión for compensation against the 1992 Fund for the damage resulting from the *Prestige* incident, in accordance with Article 4 of the 1992 Fund Convention and Article III of the 1992 Civil Liability Convention. It was noted that the claim referred to all damages suffered directly or by subrogation by the General Administration of the Spanish State and related or dependent public agencies.

France

3.7.33 The Committee recalled that at the request of a number of communes, the Administrative Court in Bordeaux had appointed experts to establish the extent of the pollution at various locations in the affected area.

United States

3.7.34 The Committee recalled that the Spanish State had taken legal action against the American Bureau of Shipping (ABS), the classification society of the *Prestige*, before the Federal Court of first instance in New York requesting compensation for all damage caused by the incident estimated initially to exceed US$700 million (£388 million) and estimated later to exceed US$1 000 million (£554 million). It was recalled that the Spanish State had maintained *inter alia* that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and that it had been negligent in granting classification.

3.7.35 It was recalled that ABS had denied the allegation made by the Spanish State and that it had in its turn taken action against the State, arguing that if the State had suffered damage, this had been caused in whole or in part by its own negligence. It was further recalled that ABS had made a counterclaim requesting that the State should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident. It was also recalled that the New York Court had dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity but that ABS was seeking reconsideration by the Court or permission to appeal.

3.7.36 The Committee noted that as part of the discovery procedure in the New York litigation, ABS had requested production by the Spanish State of all documents and material forming part of the file of the Criminal Court in Corcubión investigating the *Prestige* incident, as well as all the documents and material reviewed by the Spanish Permanent Commission for the Investigation of Maritime Accidents. It was noted that the Spanish State had responded, asserting that the requested documents and material were protected from disclosure by privilege under Spanish procedural law but that ABS had opposed the assertion of privilege. It was noted that in a decision rendered in August 2005, after having taken into account the various competing interests involved, the New York Court had denied the Spanish State's assertion of privilege and had ordered the production of the documents. It was also noted that the Spanish State had appealed against this decision.

3.7.37 The Committee noted that on 10 September 2005 the Spanish State had submitted a petition to the Criminal Court in Corcubión maintaining that these documents and material were privileged under Spanish procedural law and could not be provided to ABS and had requested the Criminal Court to take a decision on this issue. It was noted that so far no decision had been rendered.

3.7.38 The Committee recalled that the Regional authorities of the Basque Region (Spain) had taken legal action against ABS in the Federal Court of first instance in Houston, Texas, claiming compensation for clean-up costs and payments made to individuals and businesses for US$50 million (£27.7 million), arguing *inter alia* that ABS had breached its duty to inspect the *Prestige* adequately and that it had classified the vessel as seaworthy when it was not. It was also recalled that this legal action had been transferred to the Federal Court of first instance in New York which was dealing with the claim by the Spanish State referred to above. It was noted that ABS had sought permission from the New York Court to file an indemnity claim against the Spanish State, seeking recovery of any amount for which it may be held liable to the Basque Region but that the Court had not yet issued a decision in that regard.

Recourse action by the 1992 Fund against ABS

3.7.39 It was recalled that at its October 2004 session the Executive Committee had decided that the 1992 Fund should not take recourse action against ABS in the United States and had deferred any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident had come to light. It was also recalled that the Committee had explicitly stated that this decision was without prejudice to the Fund's position vis-à-vis legal actions against other parties (document 92FUND/EXC.26/11, paragraphs 3.7.42 – 3.7.72).

3.7.40 It was also recalled that the Director had been instructed to follow the ongoing litigation in the United States, monitor the ongoing investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction (document 92FUND/EXC.26/11, paragraph 3.7.71).

INVESTIGATIONS INTO THE CAUSE OF THE INCIDENT

3.7.41 The Executive Committee took note of the situation as regards the various investigations into the cause of the incident as set out in section 14 of document 92FUND/EXC.30/9.

LEVEL OF PAYMENTS AND APPORTIONMENT BETWEEN THE THREE AFFECTED STATES OF THE AMOUNT AVAILABLE FOR COMPENSATION

Previous consideration by the Executive Committee

3.7.42 It was recalled that at the Executive Committee's 21st session, held in May 2003, it had been decided that the 1992 Fund's payments should for the time being be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and the London Club. It was also recalled that at its October 2003, February 2004, May 2004, October 2004 and March 2005 sessions the Committee had decided that, in view of the remaining uncertainties as to the level of admissible claims, the level of payments should be maintained at 15% (documents 92FUND/EXC.22/14, paragraph 3.7.24, 92FUND/EXC.24/8, paragraph 3.4.43, 92FUND/EXC.25/6, paragraph 3.2.26, 92FUND/EXC.26/11, paragraph 3.7.30 and 92FUND/EXC.28/8, paragraph 3.4.34).

3.7.43 It was recalled that at the June 2005 session the Executive Committee had examined an approach outlined in document 92FUND/EXC.29/4/Add.1, prepared by the Director after discussions with the delegations of France, Portugal and Spain, which was based on an increase in the level of payments, an apportionment between the three States of the amount available for compensation and certain undertakings and guarantees to be provided by these States against overpayment.

3.7.44 It was recalled that there had been broad support for the approach proposed by the Director in his search for a solution, which would enable the Fund to increase the level of payments. It was also recalled that delegations had emphasised that their support was without prejudice to their position as regards any detailed proposal to be developed by the Director and that many delegations had emphasised the importance of ensuring that the principles of the Conventions

were followed, particularly with regard to equal treatment of victims, and of safeguarding the Fund against overpayment.

3.7.45 It was recalled that the Committee had, at its 29th session, instructed the Director to make a detailed proposal on the basis of the approach set out in paragraph 3.2.66 of document 92FUND/EXC.29/6, after consultations with the three delegations concerned and taking into account the points raised during the discussion, covering the legal and technical aspects, to be considered by the Committee at its October 2005 session (document 92FUND/EXC.29/6, paragraph 3.2.78).

3.7.46 It was noted that subsequent to the Executive Committee's June 2005 session, the Director had invited the French, Portuguese and Spanish delegations to meetings in London, which had been held on 21 July and 23 September 2005 to discuss the outcome of the Committee's deliberations.

Director's detailed proposal

3.7.47 The Committee took note of the detailed proposal that the Director had submitted for the Committee's consideration, as set out in document 92FUND/EXC.30/9/1. It was noted that the proposal addressed the following five issues:

- Estimate of the likely final amount of the admissible claims in respect of the damage in each of the three States concerned.
- A revision of the level of payments on the basis of that estimate.
- A provisional apportionment between the three States of the maximum amount payable by the 1992 Fund on the basis of the total amount of the admissible claims as established by the assessments carried out to date.
- The provision of undertakings and guarantees by the Governments of France, Portugal and Spain.
- A final apportionment between the three States of the maximum amount payable by the 1992 Fund on the basis of the final settlement of all claims arising from the incident, whether as a result of agreements with the claimants or as a result of final judgements by a competent court.

Assessment of the total amount of the admissible claims in respect of the damage in each of the three States concerned.

3.7.48 It was noted that the Spanish Government represented the great majority of claimants in respect of damage in Spain, since it had undertaken to compensate all victims in Spain.

3.7.49 It was noted that the total amount claimed in respect of damage in Spain was approximately €834 million (£565 million). It was also noted that there were some 2 020 claims presented in the proceedings before the Criminal Court in Corcubión (Spain) which had not been presented to the 1992 Fund, although it was expected that most of these would be withdrawn as a result of the compensation paid to the claimants by the Spanish Government and that on 23 September 2005 claims representing 75% of the victims in the fisheries sector had been withdrawn. It was noted that the Spanish Government had mentioned that it would submit further claims not exceeding €150 million (£102 million) for the cost of treatment of the oily residues and for the costs incurred by the local and regional authorities as a result of the incident (including payments to fishermen). It was noted, however, that the Spanish Government had indicated that the claims in respect of payments to the regional and local authorities included some items that would not be admissible and that part of the new claims would relate to clean-up costs already presented by the Government.

3.7.50 The Executive Committee noted that the joint experts had provisionally assessed the claims submitted to date in respect of damage in Spain at some €241 million (£163 million). It was noted that this amount did not include the claim for the cost of the removal of the oil from the wreck, which would be assessed only if the Committee were to decide that the claim was admissible in principle.

3.7.51 The Committee noted that the total amount claimed in respect of damage in France was approximately €97 million (£66 million), the largest claim being that of the French Government for €67.5 million (£46 million) which related to clean-up costs incurred by the Government and had been provisionally assessed at €31.2 million (£21 million). It was also noted that the other claims, for a total of €30 million (£20 million), related to clean-up costs incurred by local authorities and losses in the fisheries and tourism sectors. It was noted that the total assessed amount to date of the damage in France was some €38 million (£26 million)**.**

3.7.52 The Committee noted that in the case of Portugal, the Government was the only claimant. It was noted that the claims for €4.3 million (£3.0 million) relating to the cost of preventive measures had been provisionally assessed at €1 530 000 million (£1.0 million).

3.7.53 The Committee took note of the summary of the amounts claimed and the provisional assessments as at 1 September 2005 (rounded figures) as set out in the following table:

State	Amounts claimed	Assessed amounts
Spain	€834 000 000	€241 000 000
France	€97 000 000	€38 000 000
Portugal	€4 300 000	€1 530 000
Total	€935 300 000	€280 530 000

3.7.54 The Committee noted that it was expected that the assessed amounts would increase as the examination of the claims progressed and the additional information provided was analysed.

Provisional apportionment between the three States of the maximum amount payable by the 1992 Fund

3.7.55 The Committee took note of the Director's proposal that a provisional apportionment should be made between the three States concerned of the maximum amount payable by the 1992 Fund in respect of this incident, namely 135 million SDR minus the limitation amount of €22.8 million (£15.8 million) applicable to the *Prestige*, ie approximately €148.7 million (£101 million).

3.7.56 It was noted that the total amount of admissible claims for damage in Spain would be much higher than the amounts of admissible claims for damage in France and Portugal and that for this reason any change in the total amount of admissible claims in respect of each of the three States as a result of the continued assessment or court decisions would have only a minor effect on the final apportionment between the three States.

3.7.57 The Committee noted that in the Director's proposal the provisional apportionment between the three States should be made on the basis of the total amount of admissible claims in respect of each State as assessed at 1 September 2005, as follows:

State	Assessed amounts	Provisional apportionment
Spain	€241 000 000	85.90%
France	€38 000 000	13.55%
Portugal	€1 530 000	0.55%
Total	€280 530 000	100.00%

Level of payments

3.7.58 It was recalled that the level of the 1992 Fund's payments had in the past generally been determined on the basis of the total amount of claims already presented and possible future claims against the Fund, and not on the basis of the Fund's assessment of the admissible amounts. It was noted that on the basis of the figures presented by the Governments of the three States affected by the incident, the total amount of the claims presented and possible future claims might be as high as some €1 050 million (£711 million) and that on this basis it was likely that the level of payments would have to be maintained at 15% for several years, unless a new approach were to be taken.

3.7.59 The Committee noted that the Director had considered that an alternative way of determining the Fund's level of payments would be to base it on an estimate of the final amount of the admissible claims against the Fund, established either as a result of agreements with the claimants or by final judgements of a competent court, which was unlikely to be exceeded.

3.7.60 The Committee took note of the following analysis made on the basis of the opinion of the joint experts engaged by the London Club and the 1992 Fund on the likely final amount of the admissible claims.

In the case of Spain:

- The final assessment of the costs of the clean-up operations carried out by the Spanish Government was unlikely to exceed €235 million (£159 million).

- The final assessment of the losses incurred in the fisheries sector was unlikely to exceed €60 million (£54 million).

- Pending the Executive Committee's decision on the claim for the costs of removal of the oil from the wreck, it had been assumed that this claim for €109 million (£74 million) would be considered admissible in full.

- The non-fishery claims for economic loss were for relatively small amounts and the final assessment was unlikely to exceed €10 million (£7 million).

- As stated above, the Spanish Government would submit further claims not exceeding €150 million (£102 million). A part of these claims would relate to payments made by the regional authorities to fishermen, but the assessment of losses in the fisheries sector in Spain was already covered by the amount of €60 million set out above. Another part of the claims would relate to clean-up operations carried out by regional or local authorities. The Spanish Government had indicated that there would be a partial duplication in this regard between this part of the claims and the claims in respect of clean-up operations already presented by the Spanish Government and that the claims in respect of payments to the regional and local authorities would include some items which would not be admissible under the 1992 Fund Convention. It was unlikely therefore that these additional claims would increase the total amount of admissible claims by more than €85 million (£51 million).

In the case of France:

- It was unlikely that the final assessment of the costs of the clean-up operations carried out by the French Government would exceed €55 million (£37 million).

- The final assessment of the admissible losses incurred by non-central government claimants was unlikely to exceed €15 million (£10 million).

In the case of Portugal:

- It was unlikely that the final assessment of the costs of the preventive measures carried out by the Portuguese Government would exceed €3 million (£2 million).

3.7.61 It was noted that on the above basis, the Director considered it unlikely that the final amounts of the admissible claims would exceed the following amounts:

State	Amount (rounded figures)
Spain	€500 000 000
France	€70 000 000
Portugal	€3 000 000
Total	€573 000 000

3.7.62 The Committee noted that in the light of the estimates of the final amount of the admissible claims set out in paragraph 3.7.61 the Director considered that the level of payments could be increased to 30% as follows:

Amount available for compensation under the 1992 Civil Liability and Fund Conventions	Estimated final amount of admissible claims	Proposed level of payments
€171.5 million	€573 million	30%[<3>]

Undertakings by the States

3.7.63 It was noted that the Director had considered that, when all claims had been presented and assessed, the percentages proposed in paragraph 3.7.57 above for the purpose of provisional apportionment would have to be adjusted for the purpose of the final apportionment between the three States concerned and that the final level of payments would have to be adjusted in relation to the one proposed in paragraph 3.7.62. It was also noted that, in the Director's view, it was therefore necessary that the 1992 Fund should be provided with appropriate undertakings and guarantees from the three States concerned to ensure that the 1992 Fund was protected against an overpayment situation and that the principle of equal treatment of victims was respected.

3.7.64 The Committee took note of the proposal made by the Director that the three Governments give undertakings and guarantees as follows.

Spain

- The Spanish Government would undertake to compensate all claimants who had suffered pollution damage in Spain for amounts no less than those that would be arrived at by applying the level of payments established by the Executive Committee, if the Government had not already done so.

- The Spanish Government would undertake to repay to the Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain.

[<3>] €171.5 million / €573 million = 29.9%

- The Spanish Government would provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid by the Fund to it and 15% of the assessed amount.

Portugal

- The Portuguese Government would undertake to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal.

- The Portuguese Government would undertake to indemnify the 1992 Fund for any amounts that it had paid to other claimants for pollution damage in Portugal in accordance with an enforceable court decision.

- The Portuguese Government would provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid by the Fund to it and 15% of the assessed amount.

France

- The French Government would undertake to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.

Bank guarantees

3.7.65 It was noted that guarantees to be provided by the Spanish and Portuguese Governments should be given not by the State, but by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines. It was also noted that under the terms of the guarantees, the bank should, up to the amount of the guarantee, pay to the Fund the amount or amounts requested by the Director without him having to show the Fund's right to repayment. The Committee recalled that this corresponded to the terms of the bank guarantee provided in December 2003 in connection with the payment by the Fund of €41 505 000 (£27.9 million) to the Spanish Government.

Amount payable by the 1992 Fund on the basis of the provisional apportionment between the three States.

3.7.66 The Committee noted that the Director had considered that in order to minimise the risk of the 1992 Fund having to call upon the Portuguese or Spanish Governments to return a part of the payment made on the basis of a provisional apportionment, the 1992 Fund should at this stage base the provisional apportionment on 90% of the amount available for compensation from the Fund, ie €133.8 million (£91 million), and that the balance, €14.9 million (£10 million), would be distributed between the three States once the final apportionment has been established.

3.7.67 The Committee took note of the following proposal made by the Director as to the apportionment between the three States:

State	Assessed amounts	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank guarantees[4]
Spain	€241 000 000	85.90%	€115 000 000	€78 850 000
Portugal	€1 530 000	0.55%	€740 000	€510 500
France	€38 000 000	13.55%	€18 100 000	-
Total	€280 530 000	100.00%	€133 840 000	-

Spain

- The 1992 Fund would pay to the Spanish Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Spain of 90% of the maximum amount payable by the Fund in respect of the incident, €115 million (£78.5 million), less the amounts already paid to the Spanish Government, €57 555 000 (£39.9 million), and the amounts already paid by the Fund to other claimants in Spain, €80 000 (£55 000). The amount payable to the Spanish Government would then be € 57 365 000 (£39.1 million).

- Any amount paid by the 1992 Fund after the provisional distribution directly to claimants for damage in Spain would be taken into account in the final distribution.

Portugal

- The 1992 Fund would pay to the Portuguese Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Portugal of 90% of the maximum amount payable by the Fund in respect of this incident, ie €740 000 (£505 000).

France

- The 1992 Fund would pay to each claimant who had suffered pollution damage in France, except the French Government, an amount arrived at by applying the level of payments established by the Executive Committee to the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court.

Final apportionment between the three States of the maximum amount payable by the 1992 Fund

- Once all claims arising from the incident had been settled, whether as a result of agreements with the claimants or as a result of final judgements by a competent court, the Director would inform the Executive Committee of the total amount of admissible claims in respect of the three States concerned. The Committee would then decide, taking into account the distribution of the shipowner's limitation fund deposited with the Criminal Court in Corcubión (Spain) as decided by the courts, on any reapportionment between the three States concerned of the total amount payable by the 1992 Fund.

- The Committee would then make the necessary adjustments so that the correct proportion of the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention was received in respect of each of the three States, using the retained amount or the balance thereof as set out in paragraph 3.7.66. The 1992 Fund would have the possibility to request repayments from the Spanish and Portuguese

[4] The amounts of the bank guarantees correspond to the differences between the apportioned amounts and 15% of the assessed amounts, ie Spain €115 000 000 - €36 150 000 (€241 million at 15%) = €78 850 000; Portugal €740 000 - €229 500 (€1 530 000 at 15%) = €510 500.

Governments and to invoke the bank guarantees provided by these Governments, if required.

Consideration by the Executive Committee

3.7.68 The French, Portuguese and Spanish delegations expressed their appreciation for the efforts made by the Director in searching for an innovative solution that would be acceptable to the three affected States and at the same time be consistent with the Fund's policy. Those delegations pointed out that the proposal would benefit the victims of the pollution, carried no financial risks for the 1992 Fund but would enhance the Fund's credibility with claimants by showing that it was prepared to show flexibility and adapt to new circumstances and challenges.

3.7.69 A number of delegations supported the proposal in recognition of the magnitude of the *Prestige* incident and the exceptional circumstances surrounding it and expressed the view that it was in the best interest of the victims and that they were satisfied with the guarantees protecting the 1992 Fund against overpayment. Several delegations stressed that the solution proposed should not be seen as a precedent to be followed in future incidents. Some delegations stated that they would not be able to accept this kind of solution if it was seen by the Executive Committee as a precedent. It was also stressed that it was important that the Director reported regularly to the Executive Committee on the claims handling process to enable it to monitor the final assessments of claims and satisfy itself that the Fund was adhering to its policies and practices. However, some delegations made the point that the Committee's decision would inevitably be a precedent.

3.7.70 One delegation suggested that the claims assessments be audited and presented to the Committee in the interests of transparency and ensuring that the Fund's admissibility criteria were upheld. The Director pointed out that all assessments were subject to audits.

3.7.71 One delegation expressed concerns about the complexity of the proposed approach. The point was made that States that ratified the Conventions did so in the knowledge that they had limitations and that that delegation's preferred approach had always been for governments to stand last in the queue so as to enable individual claimants and local authorities to be paid first.

3.7.72 Some delegations expressed concerns that not all States would be able to provide the necessary financial guarantees required and that this could result in not all States and victims being treated equally.

3.7.73 The Executive Committee agreed to the Director's proposal as to the increase in the level of payments, the distribution of the amount payable by the 1992 Fund and the provisions of undertakings and guarantees by the Governments of France, Portugal and Spain and decided as follows:

1. The level of the 1992 Fund’s payments should be increased from 15% to 30% of the loss or damage actually suffered by the individual claimant as assessed by the experts appointed by the 1992 Fund and the London Club.

2. The amount €133 840 000, representing the total amount payable by the 1992 Fund, minus a reserve of 10%, should be apportioned between the three States concerned as set out in the following table:

State	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank guarantees
Spain	85.90%	€115 000 000	€78 850 000
Portugal	0.55%	€740 000	€510 500
France	13.55%	€18 100 000	-
Total	100.00%	€133 840 000	-

3. The Director was authorised to pay the Spanish Government €57 365 000 (£39.1 million), subject to the Spanish Government undertaking to compensate all claimants who had suffered pollution damage in Spain for amounts no less than 30% of the loss or damage, repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain and provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.

4. The Director was authorised to pay the Portuguese Government €740 000 (£505 000), subject to the Portuguese Government undertaking to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal, to indemnify the Fund for any amounts that it had paid to other claimants for pollution damage in Portugal and to provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.

5. The Director was authorised to pay each claimant in France, except the French Government, 30% of the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court, subject to the French Government undertaking to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.

6. The bank guarantees to be provided by the Portuguese and Spanish Governments should be given by a financial institute which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines and fulfil the other criteria set out in 3.7.65 and generally be to the satisfaction of the Director.

CLAIM FOR COSTS OF REMOVING OIL FROM THE WRECK

3.7.74 The Committee considered the question of whether the Spanish Government's claim for the costs of the operation to remove oil from the wreck of the *Prestige* was admissible in principle in accordance with the 1992 Fund's criteria. The Committee took note of the information contained in document 92FUND/EXC.30/9/2 submitted by the Director and document 92FUND/EXC.30/9/3 submitted by the Spanish delegation.

3.7.75 The delegation of the Republic of Korea stated that its Government objected to the body of water between the Korean peninsula and the Japanese archipelago being referred to as the 'Sea of Japan' in paragraph 2.3.1 of document 92FUND/EXC.30/9/2. That delegation made the point that, in its view, this body of water should be referred to as the 'East Sea', and mentioned that the denomination of this body of water was currently in dispute and was still a pending issue between the States concerned.

3.7.76 The Japanese delegation objected to the intervention by the Korean delegation on the grounds that the name 'Sea of Japan' was well established.

3.7.77 The Director stated that he had previously investigated the position taken within the United Nations on this point. He mentioned that the policy of the Cartographic Section of the United Nations was that the name 'Sea of Japan' would continue to be used, as the most common and widespread denomination for the body of water in question, until a negotiated solution was found by the parties concerned, and stated that for this reason that denomination was used in documents prepared by the IOPC Funds' Secretariat.

3.7.78 It was recalled that the *Prestige*, originally laden with a cargo of 77 972 tonnes of heavy fuel oil, had broken in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. It was recalled that a remotely operated submersible vehicle had been used to temporarily seal and plug cracks to minimise the escape of oil, as a result of which the estimated rate of loss had been reported to be less than 20 litres per day. It was also recalled that on the basis of surveys carried out in 2003 the quantity of oil remaining in the wreck had been estimated to be 13 100 tonnes in the bow section and 700 tonnes in the stern section, with an error of less than 10%, according to a document presented by the Spanish delegation to the Executive Committee at its October 2003 session (document 92FUND/EXC.22/8/2, paragraph 3.2).

3.7.79 The Committee recalled that in December 2003, following trials in the Mediterranean and subsequently at the wreck site, the Spanish Government had decided that the cargo remaining in the wreck should be removed using aluminium shuttle containers filled by gravity through holes cut in the tanks, that a contract to remove the remaining oil from the *Prestige* had been signed between the Spanish Government and the Spanish oil company Repsol YPF and that the removal of the oil, which had commenced in May 2004, had been completed in September 2004. It was recalled that some 13 000 tonnes of oil cargo had been removed from the forepart of the wreck and that no attempt had been made to remove the 700 tonnes of oil in the aft section, which had instead been treated with biological agents aimed at accelerating the degradation of the oil.

3.7.80 The Committee noted that the Spanish Government had submitted a claim for €109.2 million (£74 million) for the cost of the operation to remove the oil from the wreck of the *Prestige*, including the costs of preparatory work and the feasibility trials conducted in the Mediterranean and at the wreck site.

3.7.81 The Executive Committee took note of the review of previous IOPC Fund incidents involving sunken wrecks, which in some cases had led to claims for costs of oil removal operations, as summarised in section 2 of document 92FUND/EXC.30/9/2. It was noted that with the exception of the *Nakhodka* incident, the wrecks had sunk in relatively shallow waters close to coastlines. It was also noted that the *Nakhodka* incident was the first involving the Funds where the wreck, or part of the wreck, had sunk a long way offshore in very deep water and that notwithstanding the technological limitations in underwater oil recovery at the time of the incident, a committee set up by the Japanese Government had concluded that the oil did not pose a significant pollution threat and the Government had decided to leave the wreck untouched and instead monitor the oil being released over time.

3.7.82 It was noted that the Director had requested ITOPF to provide the 1992 Fund with an opinion on the technical reasonableness of the operation, ie on the basis of the particular circumstances of the incident, the facts available at the time of the decision to undertake the operation and whether the costs incurred and the relationship between those costs and the benefits derived or expected were reasonable.

3.7.83 It was also noted that the Spanish Government had requested an opinion from Dr Michel Girin, Director of the Centre de documentation de recherche et d'expérimentations sur les pollutions accidentelles des eaux (CEDRE) (France), Professor Lucien Laubier, Director of the Institut

océanographique de Paris (IOP) (France) and Dr Ezio Amato, a Scientific Director at the Istituto Centrale per la Ricerca Scientifica e Tecnologica Applicata al Mare (ICRAM) (Italy) on the ecological and social necessity to deal with the wreck of the *Prestige*.

3.7.84 The Committee took note of the opinion presented by ITOPF as reproduced at Annex I of document 92FUND/EXC.30/9/2 and the opinion of the team of experts appointed by the Spanish Government as reproduced at Annex II of that document.

3.7.85 The Committee noted that the Director had acknowledged the enormous technological and innovative achievement of Repsol YPF and its partners in successfully recovering 13 000 tonnes of oil from a depth of more than 3 500 metres. It was further noted, however, that in the Director's view it was important that the 1992 Fund considered the Spanish Government's claim purely against the criteria of admissibility laid down by the 1992 Fund Assembly. The Committee took note of the definition of 'preventive measures' in Article I.7 of the 1992 Civil Liability Convention, namely 'any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage' (cf Article 1.2 of the 1992 Fund Convention). Note was also taken of the criteria for the admissibility of claims for the costs of preventive measures which had been developed in 1994 by the 7th Intersessional Working Group of the 1971 Fund, approved by the 1971 Fund Assembly in 1994 and endorsed by the 1992 Fund Assembly in 1996 (1992 Fund Resolution N°3, document 92FUND/A.1/34, Annex II) and which were reflected in the Claims Manual as follows[<5>]:

> Claims for the costs of measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of compensation under the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and technical advice.

3.7.86 The Committee took note of the findings of a recent study of potentially polluting wrecks in the marine environment commissioned by the sponsors of the 2005 International Oil Spill Conference in the United States[<6>]. It was noted that in the report it was stated that the decision to salvage oil from a sunken vessel had to be based upon a sound risk assessment and a well-developed cost-benefit analysis because any salvage effort was usually expensive, time-consuming, and risky and that cost-benefit analysis had to assess the potential environmental and biological impacts of any pollution from the wreck as well as the socio-economic implications of any spill and remediation costs. It was also noted that in the report it was suggested that, based on past experience, two considerations should be at the forefront of any decision to carry out remedial activities, whether they be to off-load or salvage the remaining oil cargo from any sunken vessel or removal of the wreck, namely whether the potential environmental impact and risks posed by the oil contained within the sunken vessel outweighed the cost of the mitigation action and whether the potential combination of environmental impact/risk, economic damage and social unrest that could be caused by repetitive spills of oil contained in the sunken vessel outweighed the cost of mitigation action.

3.7.87 The Committee noted that the criteria set out in the report to the Oil Spill Conference, although much more detailed, were for the most part consistent with the Fund's admissibility criteria relating to preventive measures. It was noted, however, that the Fund's criteria did not include the issue of social unrest caused by repetitive spills, which may have been a consideration by the Spanish Government in deciding to proceed with the oil removal operation.

<5> This text is set out in the 2002 edition of the Manual (pages 18-19). The same text appears in the April 2005 edition (page 21), approved by the 1992 Fund Assembly at its 9th session, held in October 2004.

<6> Potentially Polluting Wrecks in Marine Waters – Proceedings of the International Oil Spill Conference, May 15–19 2005, Miami, Florida, USA; report prepared by J Michel *et al.*

3.7.88 The Committee noted that both ITOPF and the team of experts appointed by the Spanish Government had considered that the most likely outcome of leaving the oil in situ would have been a slow escape of oil from the wreck over many years resulting in the widespread scattering of tar balls over a vast area of the Atlantic Ocean which, depending on winds and currents, could have impacted coastlines, particularly the Spanish coast of Galicia and Cantabria. It was also noted that whilst the experts appointed by the Spanish Government did not rule out the possibility of a major release of oil due to seismic activity, ITOPF had drawn attention to the evidence from wrecks sunk in deep water for more than 30 years, which indicated that a catastrophic release was unlikely.

3.7.89 It was noted that both groups of experts agreed that it was impossible to quantify the scale of likely pollution damage in monetary terms had the oil not been removed from the wreck, but that the most likely oil release scenario would not have constituted a serious threat to marine resources. It was noted however, that whereas ITOPF had concluded that tar balls that stranded on the coast would have been cleared by local authorities along with other routine debris, the experts appointed by the Spanish Government had pointed out that the costs would have been considerable, and that as a result of the time bar provisions in the 1992 Conventions, those costs would not be recoverable in the longer term. The Committee noted that in the Director's view, although costs of clean up of pollution occurring after six years from the date of the incident would not be recoverable under the 1992 Conventions, the total costs of such operations would be very small in comparison with the costs of the operation to remove the oil from the wreck.

3.7.90 It was noted that one of the main differences between the opinions of the two groups of experts was that the experts appointed by the Spanish Government had taken into account the possible social impact of leaving the oil in situ, whereas ITOPF had focused solely on the 1992 Fund's admissibility criteria, which did not take social, non-economic effects into account. It was noted that in his consideration of the admissibility issue the Director had also not taken such effects into account.

3.7.91 The Committee noted that the Director shared the views of ITOPF and the experts appointed by the Spanish Government that a catastrophic release of the oil was unlikely and that any escape of oil from the wreck would likely have been in the form of a slow leak of small quantities of oil and that although there was a perceptible risk of oil released from the wreck reaching seafood cultivation areas in Galicia and tourist beaches of the Atlantic islands, a substantially greater release of oil would be required to cause significant damage to these resources.

3.7.92 The Committee noted that, in light of the considerations set out above, the Director was of the view that the oil remaining in the sunken sections of the *Prestige* did not pose a significant pollution threat and that the costs of the operation to remove the oil were disproportionate to any potential economic and environmental consequences of leaving the oil in the wreck and that for this reason, he considered that the Spanish Government's claim did not fulfil the criteria for admissibility laid down by the IOPC Funds' governing bodies, namely that the operation should be reasonable from an objective, technical point of view.

3.7.93 The Spanish delegation, in introducing section 4 of document 92FUND/EXC.30/9/3, stated that, the claim for the cost of removing the oil from the *Prestige* had not been taken into account by the Director in calculating the provisional apportionment of the amount payable by the 1992 Fund to Spain, but it would, if admissible, be taken into account for the purpose of the final apportionment, although it would make little difference to the amount of money that Spain would receive. The Spanish delegation stated that the claim for €109 million included potentially admissible items besides the cost of the oil removal operation itself, such as the costs of a scientific advisory committee, monitoring the oil leaking from the wreck and the oil removal feasibility studies and that these claims items could be assessed separately by the Fund's experts. The Spanish delegation made the point that ITOPF had concluded in its report that there was a perceptible risk of oil escaping from the wreck reaching Galicia. The Spanish delegation stated that this could have had a serious effect on fishing resources. The point was also made that the islands off the coast of Spain, which were very sensitive and received a very

high degree of environmental protection, could have been affected. In response to various interventions the Spanish delegation stated that the decision to remove the oil from the wreck had been taken after the deliberations and advice of a scientific advisory committee composed of more than 40 internationally recognised experts. The point was made that the Executive Committee had been continuously informed about the oil removal operation and that no opinion had been offered against the operation. The Spanish delegation also stated that the costs of the oil removal operation were not, in its view, disproportionate bearing in mind the amount of oil that was removed and in comparison with costs of similar operations that had been accepted by the IOPC Funds in relation to past incidents.

3.7.94 The French delegation stated that the decision on the admissibility of the claim should not be based on the summary of the report supporting the Director's proposal, which was in its view incomplete. That delegation also stated that it did not agree that the risk posed by the oil remaining in wreck was low and pointed out that if the Spanish Government had not removed the oil there would have been pollution over decades.

3.7.95 The Portuguese delegation stated that it considered that the oil removal operation was reasonable and the claim was admissible.

3.7.96 Several delegations expressed sympathy with the Spanish Government, but stressed nevertheless that the Fund's admissibility criteria in respect of preventive measures had to be fulfilled. Those delegations endorsed the view expressed by the Director that the cost of the oil removal operation was disproportionate to the potential economic and environmental consequences and that the claim did not therefore fulfil the Fund's admissibility criteria. The point was made that it was the right of individual States to decide what preventive measures it should take, but that if the decision was made on the basis of potential social, non-economic effects, these could not be taken into account when assessing the admissibility of claims for the costs of such measures.

3.7.97 Other delegations expressed the view that, since it was not possible to predict with any certainty what the outcome of leaving the oil in the wreck would have been, it would be difficult for any government to resist pressure from the public to ensure that the risk was eliminated. The point was made that the fact that many governments would probably have acted in the same way, suggested that the measures taken were reasonable. The point was also made that three States would have potentially been at risk from further pollution if no action had been taken and that, as a matter of principle, States were obliged to protect the environment in accordance with various United Nations Conventions and that the Fund needed to review its admissibility criteria so as to be in step with such obligations. Those delegations were of the view that the claim was admissible in principle.

3.7.98 Other delegations stated that whilst the total costs associated with the oil removal operation seemed to be disproportionate to the likely environmental and economic consequences of leaving the oil in the wreck, it could be that some of the costs of the surveys and studies may have been reasonable up to the point when the actual cost of the oil removal operation was known. Those delegations favoured assessments of the different elements of the claim to see if some were admissible.

3.7.99 One delegation asked why the Fund had not been more pro-active, given that it had been aware for some considerable time that the operation was to be undertaken and that it would lead to a substantial claim for the costs involved. The Director stated that the Executive Committee had continuously been informed of the intention of the Spanish Government to remove the oil from the wreck and of the preparations for the operation and that it was not for the Fund to intervene in relation to Government decisions of a political nature.

3.7.100 Two delegations suggested that in view of the importance of the issue it might be appropriate to request a further technical study on the technical reasonableness of the decision.

3.7.101 The Committee decided to defer any decision on the admissibility of the claim, but instructed the Director to collaborate with the Spanish Government to examine all the elements of the claim with a view to identifying possible admissible items and to assess the admissible quantum of those items for consideration by the Committee at a future session.

4 Future sessions

4.1 The Executive Committee decided to hold its 31st session on 21 October 2005.

4.2 The Committee decided to hold further sessions during the weeks of 27 February and 22 May 2006, if required.

4.3 It was decided that the Committee would hold its normal autumn session during the week of 23 October 2006.

5 Any other business

5.1 No items were raised under this agenda item.

5.2 The Executive Committee expressed its gratitude to the outgoing Chairman and Vice-Chairman for the excellent manner in which they had chaired the Executive Committee's sessions during their term of office.

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.30/WP.1, was adopted, subject to certain amendments.
